IN THE

SUPREME COURT OF THE UNITED STATES

JAMES P. WESBERRY, JR., and CANDLER COBB, JR.,
Appellants,

v.

S. ERNEST VANDIVER, as Governor of the State of Georgia,
and BEN W. FORTSON, JR., as Secretary of State
of the State of Georgia,
Appellees.

On Appeal from the United States District Court for the
Northern District of Georgia.

JURISDICTIONAL STATEMENT.

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Appellants appeal from the judgment of the United States District Court for the Northern District of Georgia, entered on June 20, 1962, dismissing an action to have declared unconstitutional and to enjoin the enforcement of the Georgia Congressional District Reapportionment Act of 1931, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW.

The opinion of the District Court for the Northern District of Georgia, Atlanta Division, is reported in **Westberry v. Vandiver**, 206 F. Supp. 276 (N. D. Ga. 1962), and is attached hereto as Appendix A.

JURISDICTION.

This action was brought pursuant to Title 42, United States Code, Section 1983 by qualified Georgia voters to have declared unconstitutional and to enjoin the enforcement of the Georgia Congressional-District Reapportionment Act of 1931, which infringes their right to vote for members of the House of Representatives in violation of rights, privileges and immunities conferred by the Constitution and laws of the United States. The jurisdiction of the District Court was predicated upon Title 28, United States Code, Section 1343 (3) and (4), and Sections 2201 and 2281. The judgment of the District Court was entered on June 20, 1961, and notice of appeal was filed in that court on August 17, 1962.

The jurisdiction of the Supreme Court to review this decision by appeal is conferred by Title 28, United States Code, Sections 1253 and 2101 (b). The following decisions sustain the jurisdiction of the Supreme Court to review on direct appeal the judgment in this case. **Baker v. Carr**, 369 U. S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962); **Colegrove v. Green**, 328 U. S. 549, 66 S. Ct. 1198, 90 L. Ed. 1432 (1946); **Wood v. Broom**, 287 U. S. 1, 53 S. Ct. 1, 77 L. Ed. 131 (1932).

STATUTES INVOLVED.

The statute, the validity of which is challenged by the Appellants in this appeal, is the Georgia Congressional District Reapportionment Act of 1931, Ga. Laws 1931, p. 46, Ga. Code, § 34-2301 (1933), which provides:

"CONGRESSIONAL-DISTRICT REAPPORTIONMENT.

No. 157.

An Act to reapportion the several Congressional Districts of this State, by abolishing the twelve (12) districts created by the reapportionment Act of 1911, and creating in lieu thereof ten (10) Congressional Districts in this State, in accordance with the Act of Congress decreasing the number of congressmen from Georgia to ten (10); and for other purposes:

Section 1. Be it enacted by the General Assembly of Georgia, and it is hereby enacted by authority of the same, that the Congressional Reapportionment Act approved August 19, 1911, being Bill No. 233, pages 146, 147, and 148 of the Acts of 1911, shall be and the same is hereby repealed, and the twelve (12) Congressional Districts created thereby are hereby abolished.

Sec. 2. Be it further enacted by the authority aforesaid, that the State of Georgia is hereby divided into ten (10) Congressional Districts, in conformity with the Act of Congress of the United States approved June 18th, 1929 decreasing the number of congressmen from Georgia to ten (10), each of said districts being entitled to elect one representative to the Congress of the United States. The districts shall be composed of the following counties, respectively:

First District: Bryan, Bulloch, Burke, Candler, Chatham, Effingham, Emanuel, Evans, Jenkins, Liberty, Long, McIntosh, Montgomery, Screven, Tattnall, Toombs, Treutlen, and Wheeler.

Second District: Baker, Brooks, Calhoun, Colquitt, Decatur, Dougherty, Early, Grady, Miller, Mitchell, Seminole, Tift, Thomas, and Worth.

Third District: Ben Hill, Chattahoochee, Clay, Crisp, Dodge, Dooly, Harris, Houston, Lee, Marion, Macon, Muscogee, Pulaski, Quitman, Randolph, Schley, Stewart, Sumter, Taylor, Peach, Terrell, Turner, Webster, and Wilcox.

Fourth District: Butts, Carroll, Clayton, Coweta, Fayette, Heard, Henry, Lamar, Meriwether, Newton, Pike, Spalding, Talbot, Troup, and Upson.

Fifth District: DeKalb, Fulton, and Rockdale.

Sixth District: Baldwin, Bibb, Bleckley, Crawford, Glascock, Hancock, Jasper, Jefferson, Jones, Johnson, Laurens, Monroe, Putnam, Twiggs, Washington, and Wilkinson.

Seventh District: Bartow, Catoosa, Chattooga, Cobb, Dade, Douglas, Floyd, Gordon, Haralson, Murray, Paulding, Polk, Walker, and Whitfield.

Eighth District: Atkinson, Appling, Bacon, Berrien, Brantley, Camden, Charlton, Clinch, Coffee, Cook, Echols, Glynn, Irwin, Jeff Davis, Lanier, Lowndes, Pierce, Telfair, Ware, and Wayne.

Ninth District: Banks, Barrow, Cherokee, Dawson, Fannin, Forsyth, Gilmer, Gwinnett, Habersham, Hall, Jackson, Lumpkin, Pickens, Rabun, Towns, Stephens, Union, and White.

Tenth District: Clarke, Columbia, Elbert, Greene, Hart, Lincoln, Madison, McDuffie, Morgan, Oconee, Oglethorpe, Richmond, Taliaferro, Walton, Warren, Wilkes, and Franklin.

Sec. 3. Be it further enacted by the authority aforesaid, that all laws, and parts of laws, in conflict herewith be and the same are hereby repealed."

QUESTIONS PRESENTED.

1. Whether an apportionment of congressional districts which deprives the Appellants of more than one-half of their effective voice in the selection of representatives in Congress violates the Equal Protection Clause of the Fourteenth Amendment.

2. Whether the Due Process Clause is violated by a congressional apportionment which deprives the Appellants of their full measure of representation in the popular house in Congress.

3. Whether a congressional apportionment which deprives the Appellants of a full voice in the selection of members of the House of Representatives deprives them of those privileges and immunities of national citizenship which are secured against invasion by the State by the Fourteenth Amendment.

4. Whether the federal courts have jurisdiction of this action to enjoin the election of members of the House of Representatives under an apportionment which violates the Constitution.

STATEMENT.

This action was brought in the United States District Court for the Northern District of Georgia by the Appellants, citizens of the United States, each of whom is a resident of Fulton County, Georgia, a registered voter of the State and qualified to vote in the election of members of the House of Representatives from the Fifth Congressional District.

The Defendants are the Governor and the Secretary of State of Georgia, who are responsible for the preparation of the ballots, the certification of candidates, the counting of returns, and the certification of Representatives elect in elections for members of the House of Representatives of the Congress of the United States.

The complaint challenges the validity of the Georgia Congressional District Reapportionment Act of 1931 on grounds that it infringes Appellants' right to a full and equal ballot in elections for members of the House of Representatives, in violation of the rights, privileges and immunities secured by the Constitution and laws of the United States. 42 U. S. C., § 1983.

The adoption by Congress in 1929, after an eighteen year lapse, of the reapportionment of the House of Representatives following the census of 1930, necessitated a reduction of the number of seats to which Georgia was entitled in the House from twelve to ten Representatives. In 1931, the General Assembly reapportioned the State into ten congressional districts, varying in population from 218,496 in the Ninth District to 396,112 in the Fifth District. By 1940, the disparity between the Fifth and Ninth Congressional Districts had climbed to 252,244; by 1950, 472,234; and by 1960, it had reached 551,526, yet the General Assembly has made no attempt to correct this discrimination.

By 1960, after 30 years without reapportionment, the population of the Fifth District had soared to 823,680, to become the second largest congressional district in the United States. The more than 820,000 people residing in Fulton, DeKalb and Rockdale Counties, comprising the Fifth Congressional District, constitute more than 20% of Georgia's entire population and yet possess only one-tenth of its representation in Congress. Although the Fifth District has more than 2.7 times the population of the Sec-

ond District, 2.8 times that of the Eighth District, and more than 3 times that of the Ninth Congressional District, each district sends one Representative to the House.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

Equality of apportionment of congressional districts constitutes a fundamental presupposition upon which that body which Madison proudly characterized the "great depository of democratic principle" is founded. Indeed, it was in the House of Representatives that the Framers of the Constitution sought to epitomize the equalitarian principles of the Declaration of Independence by affording representation to "the People." By insuring equality of political participation to its people, the government secures not only the strength of popular support, but affords to each citizen the security of an attentive consideration of his rights by those in power. Here lies the genius of representative government. **Rice v. Elmore**, 165 F. 2d 387, 392 (4 Cir. 1947). However, the government is responsive only to those upon whom its power depends. The disenfranchisement of large segments of the people due to the failure of the States to properly reapportion congressional districts threatens to undermine these basic principles upon which the structure of government rests.

For some years the federal courts have declined jurisdiction of actions which were brought to procure more equitable representation on grounds that only nonjusticiable political questions were presented. See, e. g., **South v. Peters**, 339 U. S. 276, 70 S. Ct. 641, 94 L. Ed. 834 (1950). The recent decision of the Supreme Court in **Baker v. Carr**, 369 U. S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962), emphatically dispels this misconception and for the first time the courts and the state legislatures are squarely presented with the necessity of determining the precise extent of the constitutional principles which are applicable to such

cases. In order that the legislatures of the several states may discharge their constitutional obligations, it is imperative that this Court establish in the clearest terms possible the Constitutional standards with which they are to comply.

In few cases would review by this Court be more appropriate than here, for the problem of congressional malapportionment is national in scope and profoundly affects the constitutional structure of the National Legislature. It demands an immediate, uniform and final solution which only this Court is capable of granting.

The principle of equality so eloquently declared in the Declaration of Independence has pervaded every aspect of our governmental structure from the time of its inception. **United States v. Cruikshank**, 92 U. S. (2 Otto), 542, 555, 23 L. Ed. 588 (1874). Always implicit in the concept of due process of law [**Bolling v. Sharpe**, 347 U. S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (1954), **Twining v. New Jersey**, 211 U. S. 78, 29 S. Ct. 14, 53 L. Ed. 97 (1908)], the constitutional guaranty of equality was reaffirmed by the Fourteenth Amendment. It cannot now be doubted that the protection of the Equal Protection Clause extends to political rights. **Baker v. Carr**, 369 U. S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962); **Gomillion v. Lightfoot**, 364 U. S. 339, 349, 81 S. Ct. 125, 5 L. Ed. 2d 110 (1960). "Whatever else the framers [of the Fourteenth Amendment] sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights . . . ." **Shelly v. Kraemer**, 334 U. S. 1, 23, 68 S. Ct. 836, 92 L. Ed. 1161 (1948).

These principles are particularly applicable to the election of representatives to the popular house of the national legislature, for by the clear implication of Article I, § 2, and Section 2 of the Fourteenth Amendment, Representatives in Congress must be apportioned equally

among the people within each of the several states according to their numbers. See dissenting opinion of Mr. Justice Black in **Colegrove v. Green**, 328 U. S. 549, at 570, 66 S. Ct. 1198, 90 L. Ed. 1432 (1945).

Despite these constitutional imperatives, Georgia, by legislative lethargy, has perpetuated a system of congressional districts which deprive the Appellants, and all other qualified residents of the Fifth District, of one-half of the representation in the House of Representatives to which they are entitled. Under the present apportionment, with the exception of one possible combination (the Third and Seventh Districts), the Fifth Congressional District is larger than any two other districts in the State. Thus, the 563,000 residents of the Eighth and Ninth Districts control twice the number of congressmen as do the 823,000 residents of the Fifth District. In the election of congressmen, the ballots of individual voters residing in the Second District have more than 2.7 times the effective weight of the ballots cast by each of the Appellants in the Fifth District; those cast in the Eighth District are worth 2.8 times those of the Appellants; and those cast in the Ninth District are worth more than 3 times those cast by the Appellants. These disparities are invidiously discriminatory and contravene the guaranty of equal protection of the laws of the Fourteenth Amendment. Cf. **Baker v. Carr**, 369 U. S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962). Indeed, the District Court found the Georgia apportionment of congressional districts to be "grossly out of balance" and "arbitrary . . . . as measured by any conceivable standard."[1] Despite

[1] With reference to the great inequalities between districts, the District Court said:

> "It is clear by any standard however that the population of the Fifth District is grossly out of balance with that of the other nine congressional districts of Georgia . . . It is readily apparent from those undisputed facts that plaintiffs. . . . are

these findings, a majority of that court refused to hold the apportionment to be invalid under the Fourteenth Amendment. This conclusion was based upon the fallacious and untenable proposition that a classification of citizens which is arbitrary and without rational basis may nevertheless fail to amount to an invidious discrimination which is prohibited by the Fourteenth Amendment. As this court's decision in **Morey v. Doud**, 354 U. S. 457, 463, 77 S. Ct. 1344, 1 L. Ed. 2d 1485 (1957) makes manifestly clear, these terms are substantially synonymous.

The disparities in population between congressional districts are not the product of a rational legislative judgment. Instead, they result from legislative lethargy which has perpetuated the apportionment of 1931, despite the fact that its basis has been eroded away by the massive shifts in population which have occurred since its adoption. Thus, even if the apportionment were valid in the circumstances of its enactment, the changes wrought by the massive population shifts in the 30 years which have intervened since its enactment make irrational its continued application to the election of congressmen. **Nashville C. & S. L. Ry. v. Walters**, 294 U. S. 405, 415, 55 S. Ct. 486, 79 L. Ed. 949 (1935).

These factors make clear that there is here no room for the application of the presumption of constitutionality

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being deprived of equal treatment arising from the excess of population in their congressional district as compared with that of other districts in Georgia . . . [The apportionment of congressional districts in Georgia] reflects a system which has become arbitrary through inaction when considered in the light of the present population of the Fifth District and as measured by any conceivable reasonable standard."

Accepting these findings, it is indisputable that the apportionment violates the Fourteenth Amendment. *Gulf, Colorado and Sante Fe Railway Co. v. Ellis*, 165 U. S. 150, 17 S. Ct. 255, 41 L. Ed. 666 (1897); *F. S. Royster Guano Co. v. Commonwealth of Virginia*, 253 U. S. 412, 40 S. Ct. 560, 64 L. Ed. 989 (1920); *Morey v. Doud*, 354 U. S. 457, 77 S. Ct. 1344, 1 L. Ed. 2d 1485 (1957).

which usually appertains to state legislative action. In this case, as in **Baker v. Carr**, supra, the frequency and magnitude of the inequalities between congressional districts, as well as the manner of their creation, admits of no rational legislative policy whatever.[2] This encroachment upon the fundamental rights of the Appellants may be sustained only upon a strong showing by the State of a paramount and compelling interest which demands that their right to an equal voice in the selection of congressmen be subordinated in order that voters residing in other districts may be given a greater share in government. Cf. **Bates v. City of Little Rock**, 361 U. S. 516, 524, 80 S. Ct. 412, 4 L. Ed. 2d 480 (1960); **N. A. A. C. P. v. Alabama**, 357 U. S. 449, 460-65, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1957). This the Defendants have not even attempted. The irrational and invidious inequalities imposed by the present apportionment of congressional districts must be stricken as in contravention of the Equal Protection Clause of the Fourteenth Amendment.

The right of the Appellants as electors qualified under the laws of the State of Georgia to full and equal representation in the House of Representatives is a privilege and immunity of national citizenship which is secured against invasion by the State by the Fourteenth Amendment. **United States v. Classic**, 313 U. S. 299, 61 S. Ct. 1031, 85 L. Ed. 1368 (1941); **Twining v. State of New Jersey**, 211 U. S. 78, 97, 29 S. Ct. 14, 53 L. Ed. 97 (1908).

In **Twining v. State of New Jersey**, *supra*, this Court established the controlling definition of those rights which are within the protection of the Privilege and Immunities Clause of the Fourteenth Amendment when it said:

> "Privileges and immunities of citizens of the United States . . . are only such as arise out of the nature

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[2] 369 U. S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962), concurring opinion of Mr. Justice Clark.

and essential character of the National Government or are specifically granted or secured to all citizens or persons by the Constitution . . .

"Thus, among the rights and privileges of the national citizenship recognized by this court [is] . . . the right to vote for national offices."

The right of a qualified citizen to participate in the selection of national officers is inherent in the nature of our government as one republican in form, and characterizes the relationship which exists between a citizen and the general government. The fundamental nature of this right was well described by Judge Parker when he said:

"An essential feature of our form of government is the right of the citizen to participate in the governmental process. The political philosophy of the Declaration of Independence is that governments derive their just powers from the consent of the governed; and the right to a voice in the selection of officers of government is important, not only as a means of insuring that the government shall have the strength of popular support, but also as a means of securing the individual citizen proper consideration of his rights by those in power." **Rice v. Elmore**, 165 F. 2d 387, 392 (4 Cir. 1947).

It is the Constitution which creates the right to vote for members of Congress. It establishes the office, declares that it shall be elective and adopts as its criteria the qualifications prescribed by the states for the election of the most numerous branch of their legislatures. **Ex parte Yarbrough**, 110 U. S. 651, 662-663, 4 S. Ct. 152, 28 L. Ed. 274 (1884). It is the basic policy of the Constitution that every qualified elector shall have a right to a full and equal share in the selection of members of the lower house of the national legislature. This right is

expressly secured against malapportionment of representatives among the several states by Article I, Section 2, and by Section 2 of the Fourteenth Amendment, which require that representatives be apportioned among the several states according to their numbers. However, the constitutional policy securing to each citizen a full measure of legislative representation, extends to guarantee the right against deprivations which may occur within a single state as well as those which may occur among the several states. **Colegrove v. Green**, 328 U. S. 549, 66 S. Ct. 1198, 90 L. Ed. 1432 (1946), dissenting opinion.

The power to regulate the times, places and manner of election of members of Congress delegated by the Constitution to the States does not preclude review under the appropriate constitutional standards by the federal courts. This power is, as Mr. Justice Black recognized, "not to formulate policy, but rather to implement the policy laid down in the Constitution, that, so far as feasible, votes be given equally effective weight." **Colegrove v. Green**, 328 U. S. 549, 66 S. Ct. 1198, 90 L. Ed. 1432 (1946), dissenting opinion.

This Court has been vigilant to protect the right of qualified citizens to participate in the selection of national officers. The right to vote conferred by Article I, § 2 has been held to include more than the right to merely mark a ballot and deposit it in a box. It includes the right to have the ballot counted. **United States v. Classic**, 313 U. S. 299, 61 S. Ct. 1031, 85 L. Ed. 1368 (1941); **United States v. Mosley**, 238 U. S. 383, 35 S. Ct. 904, 59 L. Ed. 1355 (1915). The right of the people to choose includes the right to have their ballots counted at their full value, undiminished by fraudulent ballots which may be cast in the same election, to the end that an individual voter will not be deprived of his full measure of participation in the selection of representatives. **United States v. Saylor**, 322 U. S. 385, 64 S. Ct. 1101, 88 L. Ed. 1341 (1944).

Yet, the right to cast a ballot of full value is of little consequence if a state may, by the manipulation of congressional districts, deprive the ballot of all practical significance. If Georgia may allocate nine of its representatives to the 270,000 residents of the Ninth Congressional District, while permitting the remaining three and one-half million citizens to elect only a single representative, the government would cease to be responsive to the will of the people and to subserve those ends for which free governments are instituted.

> "[I]t is the experience of history that the exclusion of any group of men from power is, sooner or later, their exclusion from the benefits of power. The will of the State is always operated by a government in terms of the wants of those upon whom that government depends for the refreshment of its authority . . . [N]o philosophy of politics can seriously claim to satisfy the demands of the individual unless it bases itself upon a recognition that citizens are equally entitled to the satisfaction of their desires. And the only way in which their desires can affect the will of the state with continuous emphasis is when the government of the state is compelled, by constitutional principle, to take them into definite account." Laski, **An Introduction to Politics**, 37-38 (1931).

Thus, it is apparent that the right of the people to vote for members of Congress and the right to full representation in Congress by congressional districts of approximately equal size are, by their nature, complementary in the constitutional structure. The protection of each is essential to the fulfillment of the other to the end that the government will remain responsive to the will of the people. For this reason, both are within the protection of the Privileges and Immunities Clause of the Fourteenth Amendment.

It is clear that the questions presented by this appeal are subject to the jurisdiction of the federal courts. Although the defendants, Governor and Secretary of State of Georgia, have been brought before this Court because they are officers of the State of Georgia, this is not an unconsented suit against the State forbidden by the Eleventh Amendment. This action is not one to compel the exercise of official powers by state officers, of which the federal courts are without jurisdiction, but one to enjoin the unconstitutional individual acts of state officials which the State is powerless to authorize. **Georgia Railroad & Banking Co. v. Redwine**, 342 U. S. 299, 72 S. Ct. 321, 96 L. Ed. 335 (1952); **Ex parte Young**, 209 U. S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908).

Unlike **Baker v. Carr**, 369 U. S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962), a grant of relief sought will not necessarily require the exercise of power by the State to prevent a default in representation. Congress has provided that in the event of a failure of a State to enact a valid apportionment, representatives are to be chosen state-wide in an at large election.[3]

The standing of a qualified individual voter to protect his ballot from dilution is now beyond question. **Baker v. Carr**, 369 U. S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962); **Colegrove v. Green**, 328 U. S. 549, 66 S. Ct. 1198, 90 L. Ed. 1432 (1945); **Wood v. Broom**, 287 U. S. 1, 53 S. Ct. 1, 77

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[3] 2 U. S. C., § 2 (a). Although Congress has indicated a preference in normal circumstances for the election of Representatives by districts, this section, while not precisely applicable, provides strong evidence that Congress anticipated and sanctioned the at-large election of Representatives in extraordinary circumstances. In *Smiley v. Holm*, 285 U. S. 355, 52 S. Ct. 397, 76 L. Ed. 795 (1932); *Carroll v. Becker*, 285 U. S. 380, 52 S. Ct. 402, 76 L. Ed. 807 (1932); *Koenig v. Flynn*, 285 U. S. 375, 52 S. Ct. 403, 76 L. Ed. 805 (1932), this Court enjoined elections of representatives under invalid apportionments and ordered members of Congress elected at large if the state legislatures failed to enact valid apportionments.

L. Ed. 131 (1932); **Smiley v. Holm**, 285 U. S. 355, 52 S. Ct. 397, 76 L. Ed. 795 (1932); compare **Leser v. Garnett**, 258 U. S. 130, 42 S. Ct. 217, 66 L. Ed. 505 (1922), and **Fairchild v. Hughes**, 258 U. S. 126, 42 S. Ct. 274, 66 L. Ed. 499 (1922); **Hawke v. Smith** (No. 2), 253 U. S. 231, 40 S. Ct. 498, 64 L. Ed. 877 (1920).

The power of Congress to make or alter regulations enacted by the States and the power of the House to judge the qualifications of its members do not exclude the jurisdiction of the federal courts to determine the constitutional validity of a congressional apportionment enacted by the State. **Colegrove v. Green**, 328 U. S. 549, 66 S. Ct. 1198, 90 L. Ed. 1432 (1945); **Wood v. Broom**, 287 U. S. 1, 53 S. Ct. 1, 77 L. Ed. 131 (1932); **Smiley v. Holm**, 285 U. S. 355, 52 S. Ct. 397, 76 L. Ed. 795 (1932). Rather the powers of the two branches of government are concurrent. In three cases this Court rejected the contention that it was invading the exclusive jurisdiction of Congress when it reviewed and held invalid state legislative enactments apportioning representatives in Congress. In **Smiley v. Holm**, 285 U. S. 355, 52 S. Ct. 397, 76 L. Ed. 795 (1932), an apportionment of Minnesota's eight congressional seats by the state legislature which had been vetoed by the governor was held invalid. In an opinion by Mr. Justice Hughes, the Court enjoined the election of representatives under the existing apportionment and ordered that the eight representatives be selected state-wide on an at-large basis if the state legislature should fail to reapportion the state prior to the election. Similar relief was granted in **Carroll v. Becker**, 285 U. S. 380, 52 S. Ct. 402, 72 L. Ed. 807 (1932), and **Koenig v. Flynn**, 285 U. S. 375, 52 S. Ct. 403, 76 L. Ed. 805 (1932).

In **Wood v. Broom**, 287 U. S. 1, 53 S. Ct. 1, 77 L. Ed. 131 (1932), the Court rested its decision on a ground which plainly could not have been reached if the juris-

diction of Congress were exclusive. After the lower court had enjoined the election of representatives under an apportionment enacted by the Mississippi legislature on grounds that it conflicted with the federal statutory requirement that Congressional districts contain, as nearly as practicable, an equal number of inhabitants, this Court reversed. The majority held the provision to have been impliedly repealed by its omission by Congress from the Act of 1929. Similarly in **Colegrove v. Green**, 328 U. S. 549, 66 S. Ct. 1198, 90 L. Ed. 1432 (1946), a majority of this Court squarely held the issue of the validity of an apportionment of congressional districts to be subject to its jurisdiction, rejecting the contention of Mr. Justice Frankfurter that the matter had been exclusively committed by the Constitution to the jurisdiction of Congress.

The issues presented by this appeal will not be rendered moot by the November general election. The Georgia statutes creating the unequal apportionment of congressional districts will not expire with the general election but will continue to infringe the constitutional rights of the Appellants in all future elections unless restrained by this Court. The general election of November, 1962, will be the completion of but one more of a long series of violations of Appellants' contitutional rights which have occurred in every election since the enactment of the apportionment in 1932 and which threatens to continue indefinitely until the statute is invalidated. **Porter v. Lee**, 328 U. S. 246, 66 S. Ct. 1096, 90 L. Ed. 1199 (1946). It is thus apparent that the controversy is a continuing one which will not be mooted by the general election. See **Southern Pacific Terminal Company v. Interstate Commerce Commission**, 219 U. S. 498, 31 S. Ct. 297, 55 L. Ed. 310 (1911); **Walling v. Helmrich**, 323 U. S. 37, 65 S. Ct. 11, 89 L. Ed. 29 (1944).

In a long series of decisions, this Court has dismissed as moot actions which were brought to prevent the hold-

ing of a particular election after such election had been held. **Mills v. Green**, 149 U. S. 308, 13 S. Ct. 876, 37 L. Ed. 747 (1893); **Jones v. Montague**, 194 U. S. 147, 24 S. Ct. 611, 48 L. Ed. 913 (1904); **Richardson v. McChesney**, 218 U. S. 487, 31 S. Ct. 43, 54 L. Ed. 1121 (1910); **Love v. Griffith**, 266 U. S. 32, 45 S. Ct. 12, 69 L. Ed. 157 (1924); **Blackman v. Stone**, 300 U. S. 641, 57 S. Ct. 514, 81 L. Ed. 856 (1937); **Cook v. Fortson**, 329 U. S. 675, 67 S. Ct. 21, 91 L. Ed. 596 (1946). Indeed, it had no other alternative for, after the election had been held, there remained only an abstract or hypothetical controversy (**California v. San Pablo & Tulare R. R.**, 149 U. S. 308, 13 S. Ct. 876, 37 L. Ed. 747 [1893]) and the court was powerless to grant the relief sought. Because of the continuing application of the apportionment to all future elections of Representatives, the conduct of the general election will not deprive this Court of the power to grant substantial and effective relief either by granting a declaratory judgment establishing the contitutional invalidity of the apportionment or by enjoining the individual defendants from certifying candidates and counting ballots on the basis of this inequitable apportionment of congressional districts in all future elections.

It is clear that after the general election, this case will continue to present a case or controversy within the jurisdiction of the Supreme Court. In such circumstances, this Court cannot avoid the obligation imposed by the Constitution to render an adjudication on the merits of the issues presented. As Chief Justice John Marshall said in **Cohens v. Virginia**, 19 U. S. (6 Wheat.) 264, 404, 5 L. Ed. 257, 291 (1821):

> "It is most true that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure be-

cause it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution."

CONCLUSION.

The jurisdiction of the Supreme Court to review this case on appeal is clear and unquestionable. Because of the importance of the issues involved and the apparent error in the judgment of the District Court, Appellants urge that the Supreme Court give plenary consideration to the case and permit briefs and oral argument on the merits.

Respectfully submitted,

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Proof of Service.

I, DeJongh Franklin, attorney for James P. Wesberry, Jr., and Candler Crim, Jr., appellants herein, and a mem-

ber of the Bar of the Supreme Court of the United States, hereby certify that on the 10th day of October, 1962, I served copies of the foregoing Jurisdictional Statement on the appellees therein named, by mailing copies in a duly addressed envelope, with postage prepaid, to Eugene Cook, Attorney General, State of Georgia, State Law Building, Atlanta, Georgia, attorney of record for said appellees.

DeJongh Franklin,
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Attorney for James P. Wesberry, Jr., and Candler Crim, Jr., Appellants.

APPENDIX A.

Opinion and Judgment of the Court Below.

In the
United States District Court for the
Northern District of Georgia,
Atlanta Division.

Civil Action No. 7889.

James P. Wesberry, Jr., and Candler Crim, Jr.,
Plaintiffs,

v.

S. Ernest Vandiver, as Governor of the State of Georgia,
and Ben W. Fortson, Jr., as Secretary of the
State of Georgia,
Defendants.

Before Tuttle and Bell, Circuit Judges, and Morgan, District Judge.

Circuit Judge Bell:

This is the third in a series of suits filed in this court immediately following the decision of the Supreme Court in **Baker v. Carr**, 1962, 369 U. S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663. In **Sanders v. Gray**, N. D. Ga., 1962, 203 F. Supp. 158,[1] we struck down the Georgia County Unit System of primary elections in the form in which it then existed because of resulting invidious discrimination to the plain-

[1] Now pending on appeal in the Supreme Court.

tiffs who were residents of Fulton County. Then in **Toombs v. Fortson**, Civil Action No. 7883, N. D. Ga., 1962, 205 F. Supp. 248, again on the basis of resulting invidious discrimination, we found the General Assembly of Georgia to be malapportioned and required apportionment of at least one body of the Assembly according to population. In that case, and for the same reason, we struck down the statute requiring the election of senators on a rotation basis among the counties in each senatorial district. We withheld injunctive and other relief pending action on the part of the responsible state officials, executive and legislative, before the 1963 session of the General Assembly appropriate to ending the proscribed discrimination. Our action in each of these cases was premised on the denial to plaintiffs of equal protection of the laws under the Fourteenth Amendment to the Constitution.

Plaintiffs here are residents and qualified voters of Fulton County, Georgia, and as such are entitled to vote in the primary and general elections for members of the House of Representatives of the Congress of the United States from the Fifth Congressional District of Georgia. They likewise premise their cause on the Fourteenth Amendment, seeking the invalidation of the Georgia statute which sets up the districts for the election of the ten members of the House from Georgia and which provides the method of election. Georgia Code, Section 34-2301. They contend also that this statute is void as being contrary to Art. I, Section 2 of the Constitution of the United States which provides that members of the House of Representatives shall be elected by the people.[2]

Jurisdiction and three-judge status are based on Title 28, U. S. C. A., Sections 1343, 2201-2202, 2281, 2284, and 42 U. S. C. A., Sections 1983 and 1988. Injunctive relief is

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[2] "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States. . . ."

sought against the defendants, the Governor and Secretary of State of Georgia, to the end that no elections may be held except on a state-at-large basis pending redistricting on "an equitable and representative" basis.

Georgia was awarded two members in the House of Representatives of the Congress under the Act of April 14, 1792, which apportioned representatives among the several states. 1 Stat. 253 (1792). The number of representatives allocated to Georgia increased gradually, based on population, from two to nine under the census of 1830. 2 Stat. 669 (1811); 3 Stat. 651 (1822); 4 Stat. 516 (1832). And elections in some states were on a district basis but in Georgia and in some of the other states they were on a state-at-large basis for nearly fifty years. Congress, in 1842, provided that representatives, where a state was entitled to more than one representative, should be elected from districts composed of contiguous territory, equal in number to the number of representatives to which a state might be entitled with no one district electing more than one representative. 5 Stat. 491 (1842). Georgia set up the district system in 1843 based on the 1840 census and has adhered to it at all times since then, including the election of members to the Congress of the Confederate States of America during the period of secession. Ga. Code, 1861, p. 12.

Districts were not required by the Apportionment Act of 1852, 9 Stat. 433 (1852), but were again required in 1862. 12 Stat. 572 (1862). In 1872 another element was added to the system. Not only must each district be of contiguous territory but also of an equal number of inhabitants as nearly as practicable. 17 Stat. 28 (1872). Under this Act Georgia was allocated nine representatives. Congress continued this system in 1882 and 1891 and the number of representatives from Georgia was increased to ten in 1882 and eleven under the 1891 Act. 22 Stat. 5

(1882); 26 Stat. 735 (1891). In 1901 Congress added the requirement that the districts be compact, 31 Stat. 733 (1901), and the 1911 Apportionment Act provided that:

> "Representatives to the Sixty-third and each subsequent Congress shall be elected by districts composed of a contiguous and compact territory and containing as nearly as practicable an equal number of inhabitants." 37 Stat. 13, 14 (1911).

There was no reapportionment after the census of 1920 and from 1910 to 1930 Georgia had twelve seats in the House. The Reapportionment Act of 1929, 46 Stat. 13, 26 (1929), provided that the House be reapportioned after each decennial census but failed to re-enact the requirements of compactness, contiguity, and equality of population in each district. 46 Stat. 13 (1929), Title 2, U. S. C. A., Section 2.

Under that Act Georgia lost two seats in the House and the statute here under attack followed in 1931. Ga. Laws, 1931, p. 46; Code Section 34-2301, et seq. The General Assembly divided the state into ten congressional districts on the basis of allocating the several counties to the respective districts, and there have been no changes in the allocations to date.

The facts are not in dispute and are ample for final decision on the merits. The following table shows the population of each congressional district in 1930 as compared with 1960:

District	Population, 1930	Population, 1960
First	328,214	379,933
Second	263,606	301,123
Third	339,870	422,198
Fourth	261,234	323,489
Fifth	396,112	823,680
Sixth	281,437	330,235
Seventh	271,680	450,470
Eighth	241,847	291,185
Ninth	218,496	272,154
Tenth	289,267	348,379

The burden of the complaint is the disproportionate population of the Fifth Congressional District as compared with the other districts. It is comprised of Fulton, DeKalb and Rockdale Counties. The growth of Fulton and DeKalb Counties has been spectacular in recent years with the population of DeKalb increasing from 70,278 in 1930 to 256,782 in 1960, and that of Fulton from 318,587 to 556,326. It is to be noted that the population of each of the ten congressional districts has increased from a low of slightly under fifteen per cent in the Second District to just over one hundred eight per cent in the Fifth District.

It is the position of plaintiffs that the population of each district should be within a range of ten to fifteen per cent of the average district population based on a division of the number of districts into the total population of the state.[3] The population of Georgia, according to the 1960 census, was 3,942,936. For our purposes,[4] we will take 394,000 under the theory of plaintiffs as an average and ex-

[3] An adoption of the view of the American Political Science Association.

[4] To the nearest one thousand.

amine the facts using the suggested variance of fifteen per cent. Under this theory no district should have a population of more than 453,000 nor less than 335,000. Applying the same theory to the districts as constituted in 1931 when the population of Georgia under the 1930 census was 2,908,506, an approximate average per district of 291,000, no district should have had a population of more than 335,000 nor less than 247,000.

The aforesaid table demonstrates that only the Fifth and Ninth Districts substantially varied from the fifteen per cent standard suggested by plaintiffs on the 1930 basis. The Second, Eighth and Ninth Districts fell substantially more than fifteen per cent short of the average, according to the 1960 census, while the Fifth dramatically exceeded the variance.

We hasten to add that we neither expressly nor impliedly adopt any mathematical standard. We know of no basis for an exact standard. Cf. **Sanders v. Gray**, supra, where sufficient basis existed. We use plaintiffs' suggested standard here in amplification of their contentions.

It is clear by any standard however that the population of the Fifth District is grossly out of balance with that of the other nine congressional districts of Georgia and in fact, so much so that the removal of DeKalb and Rockdale Counties from the District, leaving only Fulton with a population of 556,326, would leave it exceeding the average by slightly more than forty per cent. It is apparent that giving effect to any reasonable population based standard will require the division of Fulton County into more than one district, something not heretofore done in Georgia. The population of Fulton County alone exceeds that of the nearest district in size—the seventh—by over twenty three per cent. A chain reaction effecting the make up of every congressional district in the state

may be set off. We say this to demonstrate the legislative nature of the problem where a broad statewide approach will be needed. We also point out that such a formula as suggested by plaintiffs, requiring as it would the division of Fulton County, may or may not be agreeable to the majority of the voters of Fulton County, assuming that they are entitled to a voice in the matter, and this again points up the desirability of solution if at all possible in the legislative forum. Of course, a division of Fulton County has not been suggested, only the formula.

The problem here is not peculiar to Georgia. For example, Florida has recently substantially changed its congressional districts by reason of the addition of four new congressmen making a total of twelve. The districts there now range in population from a low of 241,250 to a high of 660,345 as compared to the Florida average of 412,630 a variance greatly exceeding the suggested standard. Dade County with a population of 935,047 is divided among two districts, one consisting of a part of Dade County only, and the other consisting of an adjoining county and the balance of Dade County. Duvall, Hillsborough, and Pinellas Counties each constitutes a district under the new plan with populations respectively of 455,411, 397,788, and 374,665, a sharp example of the variance in population per district if counties are to continue as a basis for districts except where the population of a county is so large as to require division.

There are 435 congressional districts in the United States. Twenty two congressmen will be elected state-at-large in 1962. Of the remaining 413, the Fifth District of Texas has the largest population, 951,527. The Fifth District of Georgia, here under discussion is next. There are twenty two districts with populations exceeding 600,000. Eighty districts have populations more than fifteen per

cent above the state average, while ninety have populations of more than fifteen per cent below the state district average. Using ten per cent as a variance, or tolerance, one hundred eight districts are above and one hundred twenty five are below the average, a total of two hundred thirty three or more than one-half of all congressional districts. These figures in no way reflect on the problem of deprivation of rights of the type here asserted through use of the gerrymander, a problem with which we are not concerned here but one that could well be within the rationale of any decision reached.

The following table shows the considerable difference in population in the named states between the districts having the highest and lowest number of inhabitants. Even a cursory examination of it indicates that in virtually no state do the districts contain "as nearly as practicable an equal number of inhabitants" as was formerly required by the Congress.

The table is based on only four hundred thirteen out of the total of four hundred thirty five congressional districts. Only forty two states are listed. The twenty two of the seats to be filled by elections-at-large are: Alabama —8, Alaska—1, Connecticut—1, Delaware—1, Hawaii—2, Maryland—1, Michigan—1, Nevada—1, New Mexico—2, Ohio—1, Texas—1, Vermont—1, and Wyoming—1. The districts shown are as constituted January 1, 1963 while the populations are according to the 1960 census.

State	Average Population Per District	High	Low
Arizona	434,053	663,510	198,236
Arkansas	446,568	575,385	332,844
California	414,009	591,822	301,172
Colorado	438,486	653,954	195,551
Connecticut	507,046	653,589	318,942
Florida	412,629	660,345	237,235
Georgia	394,311	823,680	272,154
Idaho	333,595	409,949	257,242
Illinois	420,100	557,221	277,169
Indiana	423,863	697,567	290,596
Iowa	393,933	403,442	353,156
Kansas	435,722	539,592	373,583
Kentucky	434,022	610,947	350,839
Louisiana	407,127	536,029	263,850
Maine	484,632	505,465	484,632
Maryland	442,955	711,045	243,570
Massachusetts	429,048	478,962	376,336
Michigan	434,621	802,994	177,431
Minnesota	426,733	482,872	375,475
Mississippi	435,628	608,441	295,072
Missouri	431,881	505,854	381,602
Montana	337,383	400,573	274,194
Nebraska	470,443	530,507	404,695
New Hampshire	303,460	331,818	275,103
New Jersey	404,452	585,586	255,165
New York	409,324	469,908	348,940
North Carolina	414,195	491,461	277,861
North Dakota	316,223	333,290	299,156
Ohio	422,017	726,156	236,288
Oklahoma	388,047	552,863	227,692
Oregon	442,171	522,813	265,164
Pennsylvania	419,235	553,154	303,026
Rhode Island	429,744	459,706	399,782
South Carolina	397,099	531,555	272,220
South Dakota	340,257	497,669	182,845
Tennessee	396,343	627,019	223,387
Texas	435,439	951,527	216,371
Utah	445,313	572,654	317,973
Virginia	396,694	539,618	312,890
Washington	407,602	510,512	342,540
West Virginia	372,084	422,046	303,098
Wisconsin	395,177	530,316	236,870

It is readily apparent from these undisputed facts that plaintiffs, not unlike many millions of other citizens

throughout the Republic, are being deprived of equal treatment arising from the excess in population of their congressional district as compared with that of other districts in Georgia. Such unequal or discriminatory treatment to be actionable, if judicially cognizable, a matter to be hereinafter discussed, must reach the point of invidiousness. **Baker v. Carr**, supra; **Sanders v. Gray**, supra, and **Toombs v. Fortson**, supra.

Our jurisdiction of a matter such as this can no longer be doubted, and it is settled that plaintiffs asserting rights of the type here involved have standing to sue. **Baker v. Carr**; **Wood v. Broom**, 1932, 287 U. S. 1, 72 S. Ct. 648, 77 L. Ed. 131; **Colegrove v. Green**, 1946, 328 U. S. 549, 66 S. Ct. 1198, 90 L. Ed. 1432; **Scholle v. Hare**, 1962, 8 L. Ed. 2d 1, and **W. M. C. A., Inc., v. Simon**, 1962, 30 L. W. 3383. We hold, too, that the issue presented is justiciable, but that question requires some elaboration.

And if the issue were one solely of state action under the Fourteenth Amendment, separate and apart from rights and duties devolving on the Congress under the Constitution and from congressional action or inaction, our problem would be greatly simplified. We would apply the test for invidious discrimination by considering all relevant factors, including a determination of rationality of state policy behind the statutory system, arbitrariness, whether the system has a historical basis in our political institutions, together with the presence or absence of political remedy. **Baker v. Carr**; **Sanders v. Gray**, and **Toombs v. Fortson**. The test is to be made on the sum of all of these factors and the asserted violation must be clear for we are dealing with the constitutionally based relationship between federal and state governments. **American Federation of Labor v. Watson**, 1946, 327 U. S. 582, 66 S. Ct. 761, 90 L. Ed. 873; **McGowan v. Maryland**, 1961, 366 U. S. 420, 81 S. Ct. 1101, 66 L. Ed. 2d 393.

If the state action—here the statute setting up congressional districts—offends fundamental political concepts inherent in a republican form of government, giving due regard to each factor and the rights of the plaintiffs and all others in their class as compared to those similarly situated in other congressional districts of Georgia, the statute must be stricken because of being discriminatory to the degree of invidiousness.

In our view the statute here when enacted reflected a rational state policy to set up the congressional districts in Georgia with some reasonable relation to population. On the other hand it now reflects a system which has become arbitrary through inaction when considered in the light of the present population of the Fifth District and as measured by any conceivable reasonable standard. The statute does have a historical basis in that it is of the type used in the remaining states of the Union with but few exceptions for more than one hundred years, and of a type that was required by the Congress from 1872 through 1929. As to political remedy, we only recently required by our decision in **Toombs v. Fortson,** that the General Assembly of Georgia be fairly apportioned. It may well be that the arbitrariness which we find to be present as the statute relates to the Fifth District and to the rights of plaintiffs will be corrected by the reapportioned Assembly.

Our view is buttressed by a due regard for the admonition in **Baker v. Carr** that a "judicially manageable standard" be adopted. This dictates that a reasonable time be afforded for the normal state governmental processes, where there is a substantial chance of relief as we believe there is, to run their course.

So tested, from the standpoint of Fourteenth Amendment rights or the right to choose Representatives under

Art. 1, Section 2 of the Constitution, we do not now find proscribed invidiousness. We would deny relief at this time but retain jurisdiction to again consider the contentions of plaintiffs, if necessary, after the expiration of a reasonable time for relief by way of political remedy.

But we cannot rest our decision at or on this point because the problem goes deeper. We are not dealing simply with state action under the Fourteenth Amendment or in violation of Art. I, Section 2 of the Constitution for the state action complained of is inextricably subject to the rights allocated to Congress under the Constitution. And defendants are entitled to their due—a final decision.

As was said for the majority in Colegrove v. Green, supra, where similar relief was sought in a suit alleging malapportioned congressional districts:

> "The petitioners urge with great zeal that the conditions of which they complain are grave evils and offend public morality. The Constitution of the United States gives ample power to provide against these evils. But due regard for the Constitution as a viable system precludes judicial correction. Authority for dealing with such problems resides elsewhere. Article I, Section 4 of the Constitution provides that 'The Time, Places and Manner of holding Elections for . . . Representatives, shall be prescribed in each state by the Legislature thereof; but the Congress may at anytime by law make or alter such Regulations . . .' The short of it is that the Constitution has conferred upon Congress exclusive authority to secure fair representation by the States in the popular House and left to that House determination whether States have fulfilled their responsibility. If Congress failed in exercising its powers, whereby standards of fairness are offended, the remedy ultimately lies with the people. Whether Congress faith-

> fully discharges its duty or not, the subject has been committed to the exclusive control of Congress. An aspect of government from which the judiciary, in view of what is involved, has been excluded by the clear intention of the Constitution cannot be entered by the federal courts because Congress may have been in default in exacting from States obedience to its mandate."[5]

Only seven members of the court participated in this decision, two concurring in the opinion by Justice Frankfurter and Justice Rutledge concurring in the result to make the majority. His concurrence was based on the view that the complaint should be dismissed for want of equity and we perceive this to be the holding of the majority. He recognized that the court had jurisdiction and that a justiciable issue was presented, citing **Smiley v. Holm**, 1932, 285 U. S. 355, 52 S. Ct. 397, 76 L. Ed. 795. He pointed out that four of the nine justices in **Wood v. Broom**, supra, where the majority dismissed a similar suit on the ground that there was no congressional requirement after the 1929 Apportionment Act of compactness, contiguity or equality in the number of inhabitants for congressional districts, were of the opinion that dismissal should have been for want of equity. His basis for the want of equity holding was that the court would be pitched into delicate relation to the functions of state officials and the Congress compelling them to take action which they have declined to take voluntarily, and because the short

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[5] The Constitution enjoins upon Congress the duty of apportioning Representatives "among the several states . . . according to their respective numbers. Article I, Section 2. Congress has at times been heedless of this command and not apportioned according to the requirements of the census. It has never occurred to anyone that the court could mandamus the Congress to perform its mandatory duty to apportion. *Colegrove v. Green*, pp. 554-555. Article I, Section 5 of the Constitution makes each House the sole judge of the qualifications of its own members.

time remaining before the election made effective relief doubtful. He thought a state-at-large election would deprive Illinois citizens of representation by districts "which the prevailing policy of Congress demands;" citing 46 Stat. 26, c. 28, as amended, Title 2, U. S. C. A., Section 2a. He concluded:

> "If the constitutional provisions on which appellants rely give them the substantive rights they urge, other provisions qualify those rights in important ways by vesting large measures of control in the political subdivisions of the government and the state. There is not, and could not be except abstractly, a right of absolute equality in voting. At best there could be only a rough approximation. And there is obviously considerable latitude for the bodies vested with those powers to exercise their judgment concerning how best to attain this, in full consistency with the Constitution."
>
> "The right here is not absolute. And the cure sought may be worse than the disease."

Justices Douglas and Murphy joined Justice Black in a dissent. It was their view that the case involved the federally protected right to vote, Article I, Section 2, Const., Fourteenth Amendment, Section 2, and it was implicit in their dissent that they considered this right to be absolute, equating it with a denial of the franchise on account of race, creed or color. Cf. **Ex parte Yarbrough**, 1884, 110 U. S. 651, 4 S. Ct. 152, 28 L. Ed. 274; **Nixon v. Herndon**, 1927, 273 U. S. 536, 47 S. Ct. 446, 71 L. Ed. 759; **Lane v. Wilson**, 1939, 307 U. S. 268, 59 S. Ct. 872, 83 L. Ed. 1281; and **United States v. Classic**, 1941, 313 U. S. 299, 61 S. Ct. 1031, 85 L. Ed. 1368. They would have invalidated the state apportionment statute and afforded plaintiffs the right to vote in state-at-large elections. They thought the state had violated a duty to bring about ap-

proximately equal representation of citizens in the Congress.

We have dwelt at some length on the **Colegrove** case because it is decisive here. It is in point and a controlling precedent if still in force. It has been cited as authority in cases involving only state action where perhaps it is no longer a controlling authority in view of **Baker v. Carr.** Cf. **South v. Peters**, 1950, 339 U. S. 276, 70 S. Ct. 641, 94 L. Ed. 834; **Kidd v. McCanless**, 1956, 352 U. S. 920, 77 S. Ct. 223, 1 L. Ed. 2d 157; **Radford v. Gary**, 1957, 352 U. S. 991; 77 S. Ct. 559, 1 L. Ed. 2d 540. We make our determination of its efficacy by a consideration of the preservative treatment given it in **Gomillion v. Lightfoot**, 1960, 364 U. S. 339, 81 S. Ct. 125, 5 L. Ed. 110 and **Baker v. Carr.**

Gomillion involved a statute gerrymandering the City of Tuskegee, Alabama, so as to deny the vote to colored citizens. Justice Frankfurter, author of **Colegrove**, wrote the decision for the eight justices making the majority, Justice Douglas concurring in the result but adhering to his dissent in **Colegrove**, and **South v. Peters**, supra. In distinguishing **Colegrove** it was said that the dismissal of the complaint was affirmed "on the ground that it presented a subject not meet for adjudication." The court stated that the decisive facts of **Gomillion** were wholly different from the considerations found controlling in **Colegrove.** The complaint in **Colegrove** was only to the dilution of the strength of votes as a result of legislative inaction over a course of many years as compared with affirmative legislative action to deprive complainants of their votes in **Gomillion.**

> "... When a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amend-

ment. In no case involving unequal weight in voting distribution that has come before the Court did the decision sanction a differentiation on racial lines whereby approval was given to unequivocal withdrawal of the vote solely from colored citizens. Apart from all else, these considerations lift this controversy out of the so-called 'political' arena and into the conventional sphere of constitutional litigation." pp. 346-347.

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". . . While in form this is merely an act redefining metes and bounds, if the allegations are established, the inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights. That was not **Colegrove v. Green.**" p. 347.

Thus **Gomillion** taught in 1960 that **Colegrove** was still a living precedent and we must determine if it was overruled or sapped of its strength by **Baker v. Carr.** That case, in one fell swoop, lifted state political action offending the Fourteenth Amendment from the ancient doctrine whereunder it was thought improper for courts to enter the "political thicket" so often involved in reapportionment and related problems.

We have carefully considered its import and have noted that the court was at pains to distinguish **Colegrove.** The rationale of the decision goes no further than to open the doors of the courts for the purpose of adjudicating consistency of state action with the Federal Constitution where no question is concerned involving a coequal political branch of the government. The treatment of **Colegrove** in **Gomillion** was reiterated. The court stated that **Colegrove** appeared to be based on a refusal to exercise equity's powers.

The various concurring opinions in **Baker v. Carr** shed much light on the meaning of the majority opinion. Justice Douglas put aside the problem of "political" questions involving the distribution of power between the Court, Congress and the Chief Executive, and noted that the power of Congress to prescribe qualifications for voters and thus override state law was not in issue. He stated that the Federal Judiciary does not intervene where the Constitution assigns a particular function wholly and indivisibly to another department, and then in closing stated that the state legislative apportionment question before the court was removed from the impediment of **Colegrove** and the cases following it by the treatment given those cases in the majority opinion, i. e., that they were based on a refusal to exercise equity's power. Justice Clark also distinguished **Colegrove.** Justice Frankfurter in dissenting stated that the appellants sought to distinguish **Colegrove** on the ground that congressional, not state legislative, apportionment was involved, and we believe that this is the course that the majority of the court took. Justice Harlan described the holding in **Colegrove** as a declination by the court to adjudicate a challenge to the apportionment of seats by a state in the federal House of Representatives in absence of a controlling act of Congress, citing **Wood v. Broom,** supra.

It would be extraordinary indeed for the court to have departed any more than was absolutely necessary from the previous standard of withholding judicial relief in matters of the kind involved in **Baker v. Carr,** and a good reason to preserve the **Colegrove** doctrine while at the same time reversing the body of law as it concerned state action alone was that fairly apportioned state legislatures might well alleviate congressional district disparity. But whatever the reason we think **Colegrove** stands and so long as it does it will be our guide.

We do not deem it to be a precedent for dismissal based on the non-justiciability of a political question involving the Congress as here, but we do deem it to be strong authority for dismissal for want of equity when the following factors here involved are considered on balance: a political question involving a coordinate branch of the federal government; a political question posing a delicate problem difficult of solution without depriving others of the right to vote by district, unless we are to redistrict for the state; relief may be forthcoming from a properly apportioned state legislature; and relief may be afforded by the Congress.[6]

Being persuaded of a want of equity in the position of plaintiffs to the extent that no cognizable constitutional claim is presented under the facts and subsisting authorities, their cause must be and is Dismissed.

This 20th day of June, 1962.

Griffin B. Bell,
United States Circuit Judge,
Fifth Circuit.

Lewis R. Morgan,
United States District Judge,
Northern District of Georgia.

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[6] Representative Celler in a hearing before the Committee on the Judiciary, House of Representatives, recently stated that it was impracticable to draw congressional district lines in Washington. He stated that the economic and social interests of an area, its topography and geography, means of transportation, the desires of the inhabitants as well as their elected representatives, and the political factors should all be considered and that state legislatures are far better equipped to determine and evaluate those factors than either the Congress or any national agency it might designate to do so. Under the proposed legislation the establishment of districts would be subject to review by the Federal District Courts. Hearing, June 24, 1959, before Subcommittee No. 2 of the Committee on the Judiciary, House of Representatives, 86th Congress, 1st Sess., on House Resolutions 73, 575, 8266 and 8473.

Tuttle, Circuit Judge, Concurring in Part and Dissenting in Part:

I concur in that part of the Court's opinion that denies an injunction at this time. I also concur in the statement of the facts. Because, however, I disagree with the conclusion that the suit should be dismissed, and because my conclusion that the injunction should be denied is based on somewhat different reasoning than that of my colleagues, I consider it appropriate to state my separate views.

The basis on which I would hold that the Court should now decline to grant the relief sought by these plaintiffs is simple. In **Baker v. Carr** the Supreme Court stressed as one of the factors which it considered as warranting a federal court's granting relief in a case of legislative malapportionment within a state the absence of any practical means by which the plaintiffs might hope to obtain relief at the hands of the state legislature. We also stressed this circumstance in the earlier cases decided by this Court. See **Sanders v. Gray**, N. D. Ga., 1962, 203 F. Supp. 158, and **Toombs v. Fortson**, N. D. Ga., 1962, 205 F. Supp. 248.

In view of the fact that this Court has now held that the Legislature of the State of Georgia must be apportioned in such a manner as to make it more responsive to population, it can not be said now that there is no reasonable likelihood that the Georgia Legislature as properly constituted will fail in the future to rectify the gross inequalities that we find now exist in the Georgia Congressional Districts. I think, therefore, that it is a part of judicial statesmanship for this Court to refrain from stepping into this particular area until after the Legislature of the State of Georgia has had a fair opportunity to correct the present abuses.

The point of difference between my views and those of my colleagues is that I am not convinced that if the Georgia Legislature persists in the future in maintaining congressional districts as grossly disproportionate as they are today, the federal courts would have no power to take cognizance of such a situation and declare the state apportionment laws unconstitutional.

The view of the majority appears to be that even though the State Legislature takes no remedial action, the plaintiffs may not obtain the relief they seek at the hands of this Court. This, they say, results from the fact that the United States Congress has the power under Article I, Section 4 of the Constitution to require the state governments to eliminate the inequalities like that here complained of. The provisions of that Section are:

> "The times, places and manner of holding elections for . . . Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such regulations . . ."

The majority opinion reads the several opinions of the Justices of the Supreme Court in **Baker v. Carr** as perpetuating what my colleagues construe to be the rationale of **Colegrove v. Green**, 328 U. S. 549, that is that where Congress has the power to deal with a matter which the States may also regulate, federal courts should not interfere with action taken by the State, even though in violation of the Fourteenth Amendment to the Constitution, because "due regard for the Constitution as a viable system precludes judicial correction." 328 U. S. 549, at 554.

It must be borne in mind that the opinion which contained the foregoing language was approved in whole by only three members of the Supreme Court out of the seven who participated in the decision. A fourth member of the Court, thus making a majority, concluded that the judg-

ment of the lower court should be affirmed, but Justice Rutledge's views make it clear that he did not accept the theory or principle that it was beyond the competence of the federal courts to grant the relief sought, but rather that he felt the plaintiffs had not demonstrated their right to equitable relief under the circumstances, including the fact that the upcoming election was so imminent as to make it "doubtful whether action could, or would, be taken in time to secure for petitioners the effective relief they seek."

I am of the firm conviction that the majority opinion of the Supreme Court in **Baker v. Carr** makes it clear that nothing said in any of the opinions in **Colegrove v. Green** denies to the federal courts the power to grant relief in a congressional district case if the complaint and proof establish a right to equitable relief from grossly disproportionate districting. On page 226 of its opinion in **Baker v. Carr**, the majority outlines what constitutes a non-justiciable "political question." It does this by enumerating the type of question that the Court had theretofore held to be non-justiciable "political questions."

> "We have no question decided, or to be decided, by a political branch of government co-equal with this Court. Nor do we risk embarrassment of our Government abroad, or grave disturbance at home if we take issue with Tennessee as to the constitutionality of her action here challenged. Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking."

As to the first of these questions referred to by the Court, which is the one which the majority here feels prevents judicial action by this Court, I consider it necessary to point out the following: Complete relief can be granted to the plaintiffs here without the slightest inter-

ference with prerogatives or powers of the Federal Congress. That body, under the reapportionment statutes referred to in the majority opinion, has directed the State of Georgia to divide the people of the State into congressional districts. Presumably Congress intended for the State to do so without constitutional standards. The fact that Congress did not expressly prescribe that congressional districts should be reasonably equal as to population does not, of course, prevent the State from districting according to equal population, nor, it seems to me, does it excuse the State from failing to do so if a failure to do so works an unconstitutional deprivation on the plaintiffs.

I find nothing in either **Colegrove v. Green** or in the language of the Supreme Court in **Baker v. Carr** discussing **Colegrove** in conflict with the views expressed here: that where Congress has directed a State to "regulate" a matter which the Constitution itself says shall initially be dealt with by the State, the State may not then, immune from judicial interference, exercise such power in an unconstitutional manner merely because Congress also has power to "at any time by law make or alter such regulations."

It is, therefore, my opinion that this Court should deny the injunction at this time, but that it should retain jurisdiction of the cause in order to give the State Legislature an opportunity to remedy what this Court has unanimously found to constitute a gross inequity. In default of such action by the State within a reasonable time, the Court should proceed to grant the relief prayed for.

This 20th day of June, 1962.

Elbert P. Tuttle,
United States Circuit Judge,
Fifth Circuit.